Supreme Court, U.S.
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No. 96-243

In the

Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,
Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,
Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

BRIEF OF AMICUS CURIAE, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, IN SUPPORT OF PETITIONER, BERNADINE SUITUM

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 37, the Building Industry Association of Washington (BIAW) respectfully submits this amicus curiae brief in support of petitioner, Bernadine Suitum. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

BIAW represents over 6,500 builders and associate members in the residential construction industry in the State of Washington. Its members employ over 100,000 people whose livelihoods depend on the right to own and use land to produce wealth.

The Fifth Amendment to the federal Constitution is a shield against overzealous land use regulation in Washington. Timely access to a judicial forum to challenge confiscatory regulation is of paramount importance to builders. This Court's ripeness doctrine has driven more than one project into bankruptcy.

Using Transferable Development Rights (TDR) as a technique for obtaining public open space at no public expense is a concept that is in its infancy in Washington State, and a topic of much controversy. The State's Growth Management Act, RCW 36.70A.060(4), prohibits designating privately owned urban areas as long term commercial forest or agricultural lands, unless a TDR program is implemented. The members of BIAW are concerned that without guidance of this Court, TDRs may be used to frustrate their rights.

BIAW is interested in the outcome of this case in that it presents the Court with an opportunity to relax the ripeness rules governing access to the courts for aggrieved land owners. BIAW hopes the Court will also reach the question of the

legitimacy of TDRs as a substitute for monetary compensation, and expose their illegitimacy.

SUMMARY OF ARGUMENT

Property rights stand on equal footing with other constitutional rights. Therefore, plaintiffs asserting taking claims deserve to have their day in court. Despite the constitutionally protected rights at stake, the ripeness doctrine has been misused to close the courthouse door to property owners with taking claims.

This case was dismissed under the "final decision" prong of the ripeness doctrine because the Court of Appeals found that the "transfer of development rights is a 'use' of SEZ [Steam Environment Zone] property." Appendix A at 8, 9. Until Mrs. Suitum attempts to sell development rights, the court ruled, her taking claim is not ripe. This ruling is predicated on an unnatural definition of the word "use." As defined in the dictionary and this Court's precedents, "use" means to put the land itself into service in order to derive enjoyment or income from it. An "economically viable" use provides landowners a "fair return on their investment" (*Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988)) "commensurate with returns on investments in other enterprises having corresp ling risks." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). It is one that is "sufficiently desirable to permit property owners to sell the property to someone for that use." *Park Ave. Tower Assoc. v. City of New York*, 746 F.2d 135, 139 (2d Cir. 1984). *No one would pay Mrs. Suitum the going rate for a developable Lake Tahoe lot solely to acquire the ability to sell 183 square feet of lot coverage to someone else.*

Rather than a use, TDRs are better viewed as a gesture of compensation. This Court said as much in *MacDonald,*

Sommer & Frates v. Yolo County, 477 U.S. 340, 350 (1986) in referring to the availability of TDRs in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *When the government offers TDRs to an owner whose land has been stripped of all conventional uses, it is a tacit admission that a taking has occurred.*

When properly viewed as an attempt at compensation rather than a use of property, the question becomes, are TDRs a legitimate substitute for the monetary compensation required under the Constitution? The answer is no. This Court decided in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), that the government (not another Tahoe Basin landowner) must pay monetary compensation (not provide some administrative remedy) when it takes private property.

Moreover, since under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the demand for money in exchange for permission to use one's own land would constitute "extortion" (*id.* at 837), the Tahoe Regional Planning Agency cannot require other Tahoe Basin landowners to buy TDRs from people like Mrs. Suitum in exchange for permission to make a use of their land that harms neither public health, safety or welfare nor the environment. "Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary ... upon the use of private property." *Washington ex rel Seattle Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

Roberge and other cases also teach that this TDR scheme violates due process because the constitutionally required remedy is contingent upon the cooperation of third parties whose cooperation cannot be compelled.

ARGUMENT

I

THIS CASE ILLUSTRATES THE NEED FOR RIPENESS REFORM

A taking claim alleges a serious violation of constitutional rights. "[T]he enjoyment of property rights was regarded by the framers ... as an essential pre-condition to the realization of other basic civil rights and liberties." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 544 (1971). Federal courts normally pride themselves as the defenders of civil rights and liberties. "The First Congress created federal courts as the chief--though not always the exclusive--tribunals for enforcement of federal rights." *McNeese v. Bd. of Educ.*, 373 U.S. 668, 672 (1962).

Yet, despite the fact that our Constitution protects "[t]he right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel" (*Lynch*, 405 U.S. at 552), federal courts seem to view taking claims as not terribly important and somewhat beneath them. *See* Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Just How Far Federal Courts Will Go to Avoid Litigating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994).

The explanation for this attitude was given in *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989): "[R]uling case law makes it very difficult to open the federal courthouse door for relief from state and local land-use decisions. The Supreme Court has erected imposing barriers in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986) and *Williamson County [Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985)]."

One commentator has stated: "Although the Supreme Court's holdings in *Williamson* ... and *MacDonald* ... rested

on procedural grounds, they have inflicted a great deal of damage on private property rights. Indeed, more damage was inflicted than if the Court had simply upheld the constitutionality of the land use regulations." Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1 (1992).

Federal courts have used the ripeness doctrine to turn away approximately 95% of the regulatory taking claims filed. *See* Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L. J. 73, 91 (1988).

Although many federal courts believe they are merely diverting these cases to the state courts for decision (*e.g.*, *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1214-15 (6th Cir. 1992)), the ironic reality is that the state courts have caught on to the utility of the ripeness doctrine as a means for reducing their dockets, and they too routinely cite *Williamson* and *MacDonald* as grounds for dismissal. *E.g.*, *R/L Assocs. v. Klockars*, 52 Wn. App. 726, 763 P.2d 1244, 1249 (Wash. Ct. App. 1988).

The case at bar is an example of how government attorneys take advantage of the ripeness doctrine to prevent judges and juries from hearing the merits of even those cases where an obvious constitutional violation has occurred.

Mrs. Suitum acquired her lot when construction of a house on the lot was legal and anticipated by its residential zoning. She paid full price for the lot, and subsequently also paid utility and public improvement assessments. The lot is surrounded on three sides by houses, and on the fourth side by a paved street with curbs, gutters, and utility hook-ups for a single family residence. First Amended Complaint at 3:1-8.

As part of its overall efforts to prevent sediment from draining into Lake Tahoe, the Tahoe Regional Planning Agency (TRPA) rezoned Mrs. Suitum's lot to prohibit any land coverage or soil disturbance.

Ordinarily, this would be considered a denial of all economically viable use and would be treated as a categorical taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). In such a case, the only issue left to be decided is whether the proffered compensation is "just." *MacDonald*, 477 U.S. at 348.

Relevant to that inquiry would be TRPA's Transferable Development Rights (TDR) program. As this Court stated in *MacDonald*:

> [A] Court cannot determine whether a municipality has failed to provide "just compensation" until it knows what, if any, compensation the responsible administrative body intends to provide. ... In Penn Central Transportation Co. v. New York City, for example, we recognized that the Landmarks Preservation Commission ... had authority in appropriate circumstances to ... remit taxes, and *transfer development rights*."

477 U.S. at 350 (emphasis added).

TRPA's regulations permit the owners of SEZ lots to sell their "development rights" (after deducting 99%) if they can find a willing buyer in TRPA's jurisdiction at a location where TRPA will approve an increase in land coverage.

Under *MacDonald*, the availability of this program should be treated as proffered compensation and considered in

determining what amount is yet due from TRPA to Mrs. Suitum as just compensation. *Id.*

However, TRPA seeks to prevent the courts from ever considering whether its TDR scheme fairly compensates property owners for a taking. Therefore, they argue that the courts may not decide whether a taking has occurred or just compensation is due because the case is not ripe.

Citing statements in *Williamson*, *MacDonald*, and *Lucas* that a property owner has a right to make economically beneficial use of his property, TRPA asserts that TDRs are not an attempt to compensate Mrs. Suitum, but are a "use" of her land! Until Mrs. Suitum applies for approval of a TDR transfer, they argue, no one knows exactly what uses will be permitted on her land, and thus her taking claim is not ripe.

The Court of Appeals accepted this argument and thereby shoe-horned this case into the "unripe" category as a quick and easy way to dispose of it.

Property owners and their attorneys should be accorded some leeway to decide whether government interference up to a given point has been sufficient to establish a taking. In Mrs. Suitum's case, for example, the Court of Appeals classified her TDR allocation as a permissible "use." Even if selling a TDR were a "use," she should have been allowed to try her case on the theory that this "use" is not sufficient to avoid a taking. After all, this Court has said repeatedly that whether the government has gone "too far" is an "essentially ad hoc, factual inquir[y]." *E.g.*, *Lucas*, 505 U.S. at 1015, *Penn Central*, 438 U.S. at 124. Property owners should be allowed to make the tactical decision whether they have assembled enough facts to present their case.

Mrs. Suitum might also choose to try her claim on the theory that, whether or not *all* uses have been denied, "the

landowner whose deprivation is one step short of complete is ... entitled to compensation." *Florida Rock Industries, Inc. v. U.S.*, 18 F.3d 1560, 1569 (Fed. Cir. 1994); *Lucas*, 505 U.S. at 1019 n. 8.

Or, Mrs. Suitum might try her claim on the theory that prohibiting all construction on a residential lot "extinguish[es] a fundamental attribute of ownership." *Agins v. City of Tiburon*, 598 P.2d 25 (Cal.Sup.Ct) (1979), *aff'd on other grounds*, 447 U.S. 255, 262 (1980); *Kaiser Aetna v. U.S.*, 444 U.S. 164, 179-80 (1979).

Or, she might try her claim on the theory that, when she and her husband purchased the lot it was advertised and zoned exclusively for residential use, and that being the only purpose for which they bought it, TRPA's action has frustrated her "reasonable investment-backed expectations." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984).

Because each case is an ad hoc factual inquiry, this Court has recognized a full palette of approaches for finding that government regulation has gone "too far." The ripeness doctrine has been misused to preclude adjudication of Mrs. Suitum's rights, even though she and her attorney believe they can prove a taking on the present record.

Taking claims deserve the same access to judicial review as any other constitutional claim. "[T]he takings clause of the Fifth Amendment [is] as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment; [and] should [not] be relegated to the status of a poor relation." *Dolan v. City of Tigard*, 512 U.S. ___, 114 S.Ct. 2309, 2320 (1994). This Court should recast the ripeness doctrine so that property owners who wish to try their case on its present facts may do so.

This Court should also reverse the Court of Appeals insofar as it held that TDRs are a potential "use" and that Mrs. Suitum's failure to request approval of a TDR transfer makes her case premature under the finality prong of the ripeness doctrine. Selling TDRs is not a use of property. Moreover, where, as here, the plaintiff is willing to stipulate that the government would approve the transfer, there is no justification for turning the plaintiff away on ripeness grounds.

II

ALLOWING THE OWNER TO TRANSFER DEVELOPMENT RIGHTS CANNOT AVOID A TAKING BECAUSE THE SALE OF DEVELOPMENT RIGHTS IS NOT AN ECONOMICALLY VIABLE USE OF LAND

This Court has oft repeated that a regulation which prohibits all economically viable uses of property is a taking. *E.g.*, *Agins*, 447 U.S. at 260; *Lucas*, 505 U.S. at 1016. Declaring a taking claim unripe on finality grounds requires a finding that some economically viable use may yet be allowed on the property that would avert a taking. *MacDonald*, 477 U.S. at 352; *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 191 (1985).

In this case TRPA contends that forcing Mrs. Suitum to leave her lot undisturbed did not necessarily take her property because an economically viable use may yet remain--namely, the ability to sell 183 square feet of land coverage. Until Mrs. Suitum attempts to make that use of her lot, TRPA argues, her taking claim cannot even be considered.

TRPA's argument is balanced upon an unnatural definition of the word "use." Take away TRPA's definition of "use" and its whole position topples like a house of cards.

Merriam-Webster's Collegiate Dictionary (10th Ed.) defines "use" as meaning "to put into service." It is the utilization of a thing that is available, but idle, in order to derive "benefit or profit" from it.

People buy land because it has the potential to be used, in the normal sense of the word. Most purchasers intend to utilize that potential themselves. However, even those purchases that investors make purely for speculation are based on the land's potential for use by the next buyer. It is the property's potential for use that gives value. That is what makes the property worth buying in the first place. "For what is the land but the profits thereof[?]" *Lucas*, 505 U.S. at 1017 (quoting 1 E Cooke, Institutes, Ch 1, § 1 (1st Am ed 1812)).

Some land is good for farming, other land is good for mining, while other land is good for grazing animals, or cutting timber, or pumping oil, or pumping water, or constructing buildings. But in every case two things are evident: (1) the activity produces a benefit or income, and (2) the activity could not occur on land where all land coverage and soil disturbance was outlawed.

This Court's recognition of an owner's right to a "fair return on their investment" demonstrates that "use" equates with an activity that produces income. *Pennell v. City of San Jose*, 485 U.S. at 13. One who invests in land expects more than an eventual refund of his money. As stated by this Court, "the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks." *FPC v. Hope Natural Gas Co.*, 320 U.S. at 603.

In the case of land that is developed with a building, construction is not the end. It is the means to an end. Whether the owner intends to live in the building, or rent it,

or operate a business from it, the building is the "principal" from which enjoyment or income will be derived.

The value of Mrs. Suitum's residential lot was its potential to be used for the construction of a custom home. With that potential taken away, and given the lot's size, its location in the middle of a residential subdivision, and the prohibition on any land coverage or soil disturbance, it has lost all ability to be "put into service" for Mrs. Suitum to enjoy or produce an income.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1981), where the taking was in the form of a physical occupation of approximately two square feet of roof space, this Court described the intrusiveness of a physical occupation in terms that could also be used to describe the effect of TRPA's regulation on Mrs. Suitum's lot: "[E]ven though the owner may retain the bare legal right to dispose of the occupied space," he is "unable to make any use of the property." *Id.* at 436.

Would the taking in *Loretto* have been avoided if the State of New York had given Mrs. Loretto a marketable coupon for two square feet of air space? Obviously not. It follows that a TDR coupon cannot restore Mrs. Suitum's otherwise taken use any more than it could have restored Mrs. Loretto's use. At most, the TDR coupon is partial compensation for the rights taken.

In *Del Monte Dunes at Monterey v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), the Court considered the possibility that in conjunction with a ban on property development, a government agency might implement a "buy-out" program for environmentally sensitive property:

> A government buy-out, of course, would not necessarily shield the government from

> the Takings Clause. Rather, the buy-out would likely implicate the issue of *just compensation*. Thus, a landowner who believed that the government bought out his property at an unfairly low price might choose to bring an action for just compensation. The fact that he already received some money from the government in return for his property does not establish as a matter of law that economically viable *uses* for his property remain.

Id. at 1432 (emphasis added).

Thus the *Del Monte* court held, "the mere fact that there is one willing buyer of the subject property ... does not, as a matter of law, defeat a taking claim." *See also Lucas*, 505 U.S. at 1018-20 & n. 8 (rejecting the dissent's view that the fact Lucas could have sold his property indicated no taking occurred).

To determine whether regulation permits economically viable use of property, the Second Circuit looks to "whether the property use allowed by the regulation is sufficiently desirable to permit property owners to sell the property to someone for that use." *Park Ave. Tower Assoc. v. City of New York*, 746 F.2d at 139.

The development rights TRPA says Mrs. Suitum may sell comprise only 1% of her parcel. Hence it is highly unlikely that anyone would pay Mrs. Suitum the going rate for a developable Lake Tahoe lot solely to acquire the ability to sell 183 square feet of lot coverage to someone else.

Where a property owner is forced to perpetually maintain her land "in its natural state" a categorical taking is assumed. *Lucas*, 505 U.S. at 1018. The government's offer

to approve the transfer of TDRs is not an economically viable use which saves the regulation from going too far, it is a gesture of compensation and, as such, is a tacit admission by the government that a taking has occurred.

Even if selling TDRs were considered an economically viable use of property, where, as here, the plaintiff is willing to stipulate that the government would approve the transfer, the court has no need to insist that the transfer be consummated. Just as the Coastal Council in *Lucas* "stipulated below that no building permit would have been issued" (505 U.S. at 1012 n.3), Mrs. Suitum is willing to stipulate that if she could locate a buyer in a proper location for her 183 square feet, TRPA would approve the transfer. Given that stipulation, going through the actual process "would have been pointless," and is therefore unnecessary to satisfy the ripeness doctrine. *Id.* In any event, however, like sale of the property, sale of TDRs is not a use of property. TDRs are also not a valid substitute for compensation.

III

ON THE MERITS, TRPA'S TDR ALLOTMENT IS NOT A VALID SUBSTITUTE FOR MONETARY COMPENSATION

When properly viewed as an attempt at compensation, rather than a use of property, the issue becomes whether government can avoid paying money by giving the owner a marketable TDR coupon instead.

For many years some states did not recognize a right to receive monetary compensation as the remedy for a regulatory taking. *See e.g., Agins v. City of Tiburon*, 598 P.2d 25 (Cal.Sup.Ct) (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). Where a property owner established that regulation had gone too far, the California courts would issue a writ of

mandate providing an administrative remedy. That changed in 1987 when this Court decided *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304.

The California court framed the issue in *First English* as "the question whether a state may constitutionally limit the remedy for a taking to *nonmonetary* relief." *Id.* at 309 (emphasis added). This Court similarly described its task as "the question whether the Just Compensation Clause requires the *government* to *pay* for 'temporary' regulatory takings." *Id.* at 313 (emphasis added).

After reviewing prior cases and "the duty to pay imposed by the Amendment" itself (at 315), this Court held "the Fifth Amendment requires that the *government pay* the landowner for the value of the use of the land [taken]."

As to whether a post-deprivation administrative remedy would suffice, this Court stated:

> [W]here the government's activities have already worked a taking of all use of property, *no subsequent action by the government can relieve it of the duty to provide compensation* for the period during which the taking was effective.

Id. at 321 (emphasis added).

Similarly, TRPA's activities have taken all use of Mrs. Suitum's property. The District Court found that the transfer of rights is the only avenue left open to Mrs. Suitum. Appendix D at 3.

TRPA's offer to approve a TDR transfer is a nonmonetary "subsequent action" like the administrative remedy struck

down in *First English*. As such, it does not relieve TRPA of the duty to pay monetary compensation.

TRPA's TDR program is a shell game, easily exposed when one considers whether TRPA could do directly what it now does indirectly. Suppose that, instead of imposing on Mrs. Suitum the responsibility of finding a buyer for her TDRs, TRPA were to pay cash to Mrs. Suitum, then sell the TDRs itself.

Imagine one day a property owner elsewhere in TRPA's jurisdiction approaches TRPA and asks for a permit to build a 2,000 square foot house. He learns that TRPA's regulations allow some land coverage on his parcel, but only enough to build a 1,820 square foot house.

Since his plans are already drawn, and there is adequate land for a 2,000 square foot house, the owner applies for a variance. TRPA finds that the public health, safety, and welfare would not be harmed by a larger house, nor would the environment. TRPA therefore approves the variance, but informs the owner that it will cost him $20,000 to buy the use of the additional square footage of his land.

Under this Court's holding in *Nollan v. California Coastal Commission*, 483 U.S. 825, the demand for money in exchange for permission to use one's own land constitutes "extortion." *Id.* at 837. Applying the *Nollan* analysis, had TRPA simply demanded $20,000 from the man, rather than conditioning his variance upon such a payment, "no doubt there would have been a taking." *Id.* at 831. *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (money is property, and is protected by the Takings Clause).

"Given, then, that requiring [the payment] outright would violate the Fourteenth Amendment, the question be-

comes whether requiring it ... as a condition for issuing a land use permit alters the outcome." *Nollan*, 483 U.S. at 834.

"[A] permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if refusal to issue the permit would not constitute a taking." *Id.* at 836.

First of all, TRPA's refusal to issue the variance *would* constitute a taking. Land use regulation constitutes a taking whenever it does not "substantially advance legitimate state interests." *Id.* at 834; *Agins, supra*, 447 U.S. at 260. Since increasing the owner's lot coverage will not harm public health, safety, welfare, or the environment, denial of his request to enjoy the use of his own land would be arbitrary.[1]

> The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."

Nectow v. Cambridge, 277 U.S. 183, 188 (1927).

"Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary ... upon the use of private property." *Washington ex rel Seattle Trust Co. v. Roberge*, 278 U.S. at 121. For "the right to build on one's

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[1] If it *would* harm the public health, safety or welfare, or the environment, TRPA could not approve the site as a receiving area under its own regulations.

own property ... cannot remotely be described as a 'government benefit.'" *Nollan*, 483 U.S. at 833 n. 2.

Second, even if TRPA could lawfully refuse to issue the permit, the demand for $20,000 would not serve the same purpose as permit denial. Permit denial would limit land coverage on the parcel to 1,820 square feet. The $20,000 will neither limit land coverage on the lot nor mitigate the additional land coverage. Someone might argue that the $20,000 will be used to prevent land coverage on Mrs. Suitum's lot. But that is untrue. TRPA's SEZ regulations *already* prohibit land coverage on Mrs. Suitum's lot, whether this other owner shows up for a variance or not. The $20,000 will merely replenish TRPA's budget.

Since TRPA cannot directly charge permit applicants for increased lot coverage, it should not be allowed to indirectly charge them by artificially lowering their land coverage ratio below what public health, safety, and welfare require, then forcing them to buy back land coverage from people like Mrs. Suitum to whom TRPA owes money.

Finally, TRPA's TDR program is not a legitimate substitute for monetary compensation because it makes the constitutionally required remedy contingent upon Mrs. Suitum obtaining the cooperation of a third party whose cooperation she cannot compel.

To convert her TDR coupon into cash Mrs. Suitum must find (1) a willing third party (2) who owns land under TRPA's jurisdiction, (3) whose land is vacant or not fully utilized, (4) who wants to build or expand, (5) now or in the near future, and (6) whose plans, including expanded land coverage, would be approved by TRPA. Then, *if* the supply and demand conditions of the market are such that TDR coupons sell for the fair market value of the land coverage they represent, Mrs. Suitum will receive the cash value of the use (but not the

ownership) of 183 square feet, less the costs of sale (*e.g.*, advertising and broker's commission). She will *not* be compensated for the other 99% of her property. Any debt service on the property, including the 183 square feet, will still be her responsibility. Any taxes, including for the 183 square feet, will still be her responsibility.

All of the six conditions listed above may or may not exist, and are not within Mrs. Suitum's control.

In *Washington ex rel. Seattle Trust Co. v. Roberge*, *supra*, this Court struck down a Seattle zoning ordinance requiring plaintiffs who sought to rebuild a home for the aged poor to first get the written consent of two-thirds of the property owners within 400 feet of the project. The Court held that it is "repugnant to the due process clause of the Fourteenth Amendment" to empower other property owners with authority to frustrate plaintiff's property rights. *Id.*, 278 U.S. at 144. "They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject [plaintiff] to their will or caprice." *Id.*

A similar holding, although based upon citations to state court precedents, is found in *Sederquist v. City of Tiburon*, 765 F.2d 756 (9th Cir. 1984) where the Court of Appeals held that property rights cannot be constitutionally conditioned upon the property owner securing the "joint action" of third persons whose action cannot be compelled by him. *Id.* at 760-61. *See also Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912) ("There is control of the property of plaintiff ... by other owners of property exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power").

In the same way, requiring Mrs. Suitum to secure the cooperation of some unidentified (and perhaps nonexistent) third party before she can receive compensation, when the co-

operation of that third party is not compelled, is a violation of her right to due process.

CONCLUSION

For the reasons above stated, this Court should reverse the Court of Appeals insofar as it held that a taking of all use of the subject property is not ripe for review until the owner pursues the sale of TDRs, and insofar as it held that TDRs are a potentially viable economic use of property. For guidance on remand, this Court should also consider whether TRPA's TDR scheme acts as a legitimate substitute for monetary compensation, and hold that it does not.

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Respectfully submitted,

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